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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA  
THIRD APPELLATE DISTRICT  
(Shasta)

THE PEOPLE,

Plaintiff and Respondent,

v.

CURTIS WAYNE TAYLOR et al.,

Defendants and Appellants.

C064852

(Super. Ct. Nos.  
08F5142 & 07F1047)

Defendants Curtis Wayne Taylor and Beau Houston Gray assaulted Travis Smith, causing Smith to suffer a traumatic brain injury. Smith was hospitalized for eight days and died less than 48 hours after being discharged. Between the time he left the hospital and his death, Smith consumed alcohol and medication that had not been prescribed for him despite being told not to do so by his physician.

Following a joint trial, a jury found defendants not guilty of first degree murder (Pen. Code, § 187, subd. (a))<sup>1</sup> or torture (§ 206) but guilty of second degree murder and assault with force likely to cause great bodily injury (§ 245, subd. (a)(1)). The jury also found true an allegation defendants inflicted great bodily injury during the commission of the assault. (§ 1192.7, subd. (c)(8).)<sup>2</sup> In a bifurcated proceeding, the trial court found true allegations Taylor had a prior strike conviction (§ 1170.12), served two prior prison terms (§ 667.5, subd. (b)), and was released on bail when he committed the assault (§ 12022.1).

The trial court sentenced Gray to an aggregate term of 19 years to life in state prison, consisting of 15 years to life for murder, plus a consecutive 4 years (the upper term) for assault with force likely to cause great bodily injury.

The court sentenced Taylor to an aggregate term of 42 years and 8 months to life in prison, consisting of 30 years to life (15 years to life doubled for the prior strike) for murder, a consecutive 8 years (the upper term doubled for the prior strike) for assault with force likely to cause great bodily injury, plus a consecutive 2 years for the bail enhancement, a consecutive 2 years for the 2 prior prison terms, and a

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<sup>1</sup> Further undesignated statutory references are to the Penal Code.

<sup>2</sup> The jury found not true a special allegation that the murder involved the infliction of torture. (§ 190.2, subd. (a)(18).)

consecutive 8 months (one-third the middle term) on an unrelated matter.

Defendants appeal, contending the trial court prejudicially erred in failing to sua sponte instruct the jury on independent intervening causation, sua sponte instruct the jury on unanimity as to the assault charge, or stay their sentences for assault under section 654.<sup>3</sup> They also assert that the prosecutor committed misconduct during closing argument, and that they received ineffective assistance of counsel. In addition, Taylor claims the admission of Gray's redacted confession violated his Sixth Amendment right to confront and cross-examine witnesses against him, and there was insufficient evidence to support the court's finding that he had a prior strike conviction.

We shall conclude that the trial court erred in refusing to stay defendants' sentences for assault with force likely to cause great bodily injury, modify the judgments to stay defendants' sentences for that offense, and affirm the judgments as modified.

#### FACTUAL AND PROCEDURAL BACKGROUND

On June 8, 2008, defendants spent the day drinking alcohol and smoking marijuana at the Shady Oaks Mobile Home Park with 14-year old T.D., 18-year old Tabitha Bigger, Shane Venzke, and others.

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<sup>3</sup> Each defendant joins in the arguments made by the other on appeal to the extent they accrue to his benefit.

At some point T.D. left with the victim Smith, who was "extremely drunk," and two others to get more alcohol. According to T.D., Smith touched her "butt" as she was getting into the car and, once inside, touched her hand and told her she was pretty. Word of Smith's alleged touching quickly spread throughout the trailer park.

After returning from the store, Smith went to the home of Jimmy Jones, who also lived in the trailer park, and told Jones that "[t]hose people down at the trailer park think I touched that little girl." Jones asked Smith whether he had touched her, and Smith said, "No." Smith purchased some methamphetamine from a woman at Jones' home and snorted a line or so that night.

Later that evening, Jones and Smith were approached by defendants as they walked along a canal near the trailer park. T.D., Venzke, and Bigger were also present. Taylor punched Smith in the face, and Smith fell to the ground, striking his head. While Smith was on the ground, Gray stomped on his head. Jones asked Taylor why he attacked Smith, and Taylor said it was because Smith was a child molester. Defendants left Smith unconscious and bleeding, returned to the trailer park, and continued partying.

Less than an hour later, defendants returned to Smith, who remained on the ground where he had been beaten. Taylor asked Smith whether he was going to touch little girls again, and Smith said, "Yeah." Taylor then slapped him. Taylor again asked Smith whether he was going to touch little girls, and Smith said, "Fuck yeah." Taylor then punched or kicked Smith,

while Gray stomped on his head "really hard" with the entire weight of his body. Defendants emptied Smith's pockets, taking his wallet, marijuana, methamphetamine, and possibly a ring. Defendants left Smith unconscious and went to Jones' home. They had methamphetamine when they arrived. Jones tasted the methamphetamine and identified it as the same methamphetamine his friend sold to Smith earlier that evening.

Approximately 20 minutes later, defendants again returned to Smith. As Smith attempted to move, Taylor began punching him in the face, while Gray stomped on his head and chest. Smith pleaded with defendants to stop. When defendants were finished, Smith was barely able to speak. Taylor urinated on his head.

Defendants told T.D. and Bigger not to call an ambulance or 911 and not to tell the police anything about defendants' involvement if questioned. If they did, Taylor said "he would know who did it and something would be done." Taylor asked Gray to take Smith home so he did not die where he lay, and Gray told Taylor that Smith "could lay there and die for all he cared."

Early the next morning, T.D. walked by the scene of the beatings, and Smith remained there unconscious. Defendants also were there. Taylor was cleaning off the fence near where the beatings took place, while Gray stood around. At approximately 6:30 a.m., a mountain biker saw Smith and asked a resident of the trailer park to call for help.

Ten to fifteen minutes later, a Redding police officer arrived and found Smith unconscious next to the fence. Smith's eye was swollen and discolored, and he had blood running from

his nose. Smith told the officer he had fallen during the night and injured himself. Smith smelled like alcohol and had trouble standing. The officer called an ambulance, and Smith was taken to the hospital.

Smith was diagnosed with a traumatic brain injury and was placed in the hospital's intensive care unit. He had multiple intracerebral contusions and an "altered level of consciousness." He also appeared to be suffering from acute alcohol withdrawal. He remained in the hospital for eight days. When he was released on June 16, 2008, his discharge papers did not say that he should refrain from consuming alcohol; however, Dr. Ashok Jain, the consulting neurosurgeon on Smith's case, told Smith and Smith's sister that Smith should not consume alcohol or take any medication without Dr. Jain's knowledge.

After being released, Smith stayed with his sister. He was unusually quiet, complained that his head hurt, and said he wanted to lie down. His wife visited him at his sister's home on June 17, 2008, the day after he was released from the hospital. Smith told her that he "wanted to go into a rehab because he was going to die if he continued to drink . . . ." He also complained of pain in his head. Smith was unusually quiet during her visit.

Later that evening, Smith drank beer with a friend, who observed that Smith "wasn't himself." Smith "collapsed, fell down" on his way to the restroom. He was not finishing his sentences and was jumping from topic to topic. He also appeared pale. His friend left around 9:00 or 10:00 p.m. Smith's

sister's boyfriend last saw Smith at 11:30 p.m.; he was the last person to see Smith alive. Smith's sister discovered Smith's body the following morning, June 18, 2008, at approximately 7:00 a.m. There were several empty 12-ounce beer cans and three empty 32-ounce beer cans near Smith's body.

Later that day Gray was interviewed by Officer Todd Cogle of the Redding Police Department. When asked what he was doing on June 8, 2008, before Smith was assaulted, Gray said he was drinking in the trailer park with a couple of "chicks" when Smith walked through, and one of the "chicks" started "freaking out," saying that Smith had molested her. Gray asked Smith if he was going to stop touching little girls. Gray initially said that Smith pulled out a knife and attempted to cut him, and that he kicked Smith in the head. Later, Gray acknowledged Smith did not pull a knife on him and confirmed that when Smith attempted to get up, Gray kicked him back down. Gray said that Smith was "hurting" but still talking when Gray left. Gray returned to Smith two or three times during the course of the night, and Smith was beaten each time. After Gray returned the second time, Smith was badly beaten; he had blood coming out of his nose and mouth, and his eyes were so swollen he could not see out of them. Gray said Smith received 100 blows over the course of the evening but later gave different estimates.

Dr. Susan Comfort, a forensic pathologist with the Shasta County Sheriff's Coroner System, performed a postmortem examination of Smith's body hours after it was discovered. She found several skull fractures. "[T]he largest and most

impressive fracture was in . . . . the back of the head. It was slightly depressed, meaning the bone was actually pushed with enough force that it bent inwards, and radiating from a point of impact on that left area were three fractures, which then coursed into separate areas of the skull, one more towards the front, and the other two more towards the back of the head." She also found a separate fracture on the left side of the temporal region, which "ran down and intersected [with the] . . . fractures that were in the back of the head." The fracture on the back of Smith's head was consistent with a very hard blow or falling backward and hitting the ground. The fracture on the left side was consistent with a kick to the head. Dr. Comfort also observed multiple contusions on the brain that corresponded to the fractures.

After performing the physical examination but before receiving the toxicologist's report, Dr. Comfort cautioned Officer Cogle that Smith may have died as a result of methamphetamine poisoning, alcohol poisoning, or a mixture of the two. In addition to the head trauma, she found ischemic bowel changes, which can be caused by methamphetamine use. She advised Officer Cogle that it would be "pretty risky" to charge anyone with Smith's murder before she made her official ruling on the cause of death. She explained that "if we get the tox back and he's got methamphetamine and alcohol, then I'm going to be ruling it as an accidental drug, mixed drug and alcohol intoxication." When asked what her opinion as to the cause of death would be "if the tox comes back clean or with just alcohol



on board," Dr. Comfort responded, "Well then, we're only left with head injuries."

The toxicology report indicated that Smith's blood alcohol level was .14, which is equivalent to consuming seven beers. He also had a very low level of Fentanyl,<sup>4</sup> which had not been prescribed, in his system. Alcohol and Fentanyl reduce blood flow to the brain and could have been fatal to someone with Smith's injuries. No methamphetamine was found. Dr. Comfort opined that Smith's death was caused by blunt force injuries to the head, and that alcohol and Fentanyl intoxication were contributing factors. She concluded that blunt force trauma was a substantial cause of Smith's death, and that he would not have died had he not been so severely beaten 10 days earlier.

Dr. Comfort estimated that Smith died around midnight on June 17, 2008. She based her estimate on the investigator's observation of rigor in Smith's arms, legs, and jaw at approximately 7:00 a.m. the following morning. Smith's state of rigor indicated he had been deceased for approximately eight hours. Once a person is deceased, his or her body stops metabolizing alcohol.

Two CAT scans were taken of Smith's head upon his arrival at the hospital; neither revealed a skull fracture. Dr. Noel Curcio, one of Smith's treating physicians, believed it was possible that the skull fractures observed by Dr. Comfort were

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<sup>4</sup> Fentanyl is a narcotic analgesic that is used for pain and as a sedative.

missed but thought it was more likely that the fractures were received after Smith was discharged. He acknowledged that Smith's injuries were consistent with a skull fracture, and that a person with severe injuries like those discovered during the autopsy could succumb to those injuries days or weeks after they were inflicted.

Dr. Jain also believed that it was unlikely the radiologists who interpreted Smith's CAT scans missed any fractures. Had Smith suffered the fractures prior to being released, Dr. Jain doubted that Smith's clinical condition would have been as good as it was. Dr. Jain would not be surprised to find skull fractures in a person who had suffered the multiple traumatic injuries to the brain that Smith had. He would "probably disagree" with Dr. Comfort's finding that the cause of death was blunt force trauma sustained 10 days before Smith's death because Smith's clinical condition was very good at the time he was discharged, and Dr. Jain had never seen that happen before.

The fact that the skull fractures were not observed on the CAT scans did not alter Dr. Comfort's opinion that the fractures were caused at the same time as the brain contusions. She based her opinion on the fact that the skull fractures corresponded to the locations of the brain contusions, and the absence of any fresh trauma to the brain or injury to the scalp. She explained that with "a very thin hairline fracture such as what you see here . . . and also when it's fresh . . . it's very easy not to see it on an imaging scan . . . ." When she shared her findings

with one of the radiologists that reviewed the CAT scans, he was not surprised that she found a fracture he did not and "said sometimes when the fractures are located down at the bottom of the skull or base of the skull is an area that is harder to scan, and sometimes it's easy to miss a fracture, especially if it's not displaced and just a simple hairline fracture." Dr. Comfort further explained that if the fractures were caused by a fall after Smith was released from the hospital, she would expect to find corresponding fresh trauma to the brain or fresh injury to the scalp, which she did not. Instead, she observed "some early signs of healing" that were consistent with the injuries being 10 days old.

Dr. Paul Herrmann, a forensic pathologist called by Taylor, opined that Smith "died as a result of a combination of injuries to his brain and also Fentanyl and alcohol intoxication." Had Smith not used alcohol or Fentanyl, it is unlikely he would have died when he did. Similarly, if Smith had not suffered the brain injuries as a result of defendants' attack, "the Fentanyl and alcohol would not have killed him."

Defendants did not dispute assaulting Smith. Rather, during closing arguments Taylor's counsel conceded: "As far as the assault, at least as far as my client is concerned, he definitely assaulted Travis Smith. There's no doubt about that. And there's no doubt that in my mind that Travis Smith suffered something." Gray's counsel likewise acknowledged that "there was an assault here, and certainly there was great bodily injury that was done here." Defendants did, however, dispute that they

had the requisite intent for murder and urged that Smith died as a result of his own actions following his release from the hospital, and not as a result of the assault.

## DISCUSSION

### I

#### Any Potential *Aranda-Bruton*<sup>5</sup> Error Was Harmless Beyond A Reasonable Doubt

Taylor contends the admission of codefendant Gray's extrajudicial statements, which he contends inculcated him in Smith's beating in the context of the prosecutor's questioning, violated his Sixth Amendment right to confront and cross-examine witnesses against him insofar as Gray did not testify and thus could not be cross-examined at trial. As we shall explain, any error in admitting Gray's redacted statements was harmless beyond a reasonable doubt because Gray's statements were merely corroborative and cumulative to the overwhelming and properly admitted evidence of Taylor's guilt. (See *People v. Song* (2004) 124 Cal.App.4th 973, 984.)

Following his arrest, Gray was interviewed by Officer Cogle and made statements inculcating both Taylor and himself in Smith's beating. During the in limine proceedings, Taylor moved

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<sup>5</sup> *People v. Aranda* (1965) 63 Cal.2d 518 (*Aranda*); *Bruton v. United States* (1968) 391 U.S. 123 [20 L.Ed.2d 476] (*Bruton*). "Aranda and Bruton stand for the proposition that a 'nontestifying codefendant's extrajudicial self-incriminating statement that inculcates the other defendant is generally unreliable and hence inadmissible as violative of that defendant's right of confrontation and cross-examination, even if a limiting instruction is given.' [Citation.]" (*People v. Jennings* (2010) 50 Cal. 4th 616, 652.)

to exclude Gray's statements insofar as they inculpated him in the crimes. The prosecutor did not object to Taylor's motion so long as he was permitted to "introduce statements of one defendant with regard to strictly what . . . *he did.*" (Italics added.) The prosecutor explained that he intended to introduce Gray's statements "through testimony with the questions limited to what did Mr. Gray say he did next . . . ." The trial court agreed that was an appropriate way to proceed and granted Taylor's motion.

At trial, the prosecutor introduced Gray's statements through the testimony of Officer Cogle. The prosecutor began by asking Officer Cogle whether Gray told "you what his involvement was in the beating of Travis Smith?" Officer Cogle responded in the affirmative, and the prosecutor asked whether Gray told him "what he was doing on June 8th 2008 before the assault?" Officer Cogle testified that Gray said he had been drinking beer with a couple of "chicks" when Smith approached, and one of the "chicks" started "freaking out," saying that Smith had molested her. Gray said he approached Smith, asked Smith if he was going to stop touching little girls, and Smith pulled out a knife and tried to cut Gray. Gray kicked Smith in the head. (Gray later admitted that Smith did not pull a knife on him.) Gray stated that when he left, Smith was hurting but still talking. Gray told Officer Cogle that he went back to Smith's location two or three times during the course of the evening. The prosecutor's direct examination of Officer Cogle then proceeded as follows:

"Q. Okay. . . . [¶] During those two to three times, did Mr. Gray tell you that [Smith] was beaten each of those two or three times?

"A. He did.

"Q. Did he tell you that [Smith] was urinated on during one of those additional beatings?

"A. He did.

"Q. Did he tell you the condition of [Smith] after he went back the second time?

"A. He described him as being badly beaten with blood coming out of his mouth and nose and collecting on his mustache, that his eyes were swollen shut to the point where he couldn't see out of them.

"Q. All right. Did he give you a total number of blows that [Smith] received during those three times?

"A. He estimated at approximately a hundred.

"Q. Okay. And did he later modify that number?

"A. He -- he gave a couple of different numbers during the interview.

"[¶] . . . [¶]

"Q. During the incident, did he say whether property was taken from Travis Smith?

"A. He did.

"Q. What property did he say was taken?

"A. He said a little bit of marijuana, some methamphetamine, and approximately \$5 in cash."

At that point, Gray's counsel objected, arguing that based on the way the last two questions were phrased, jurors would assume that Gray, not Taylor, took the property from Smith, when Gray had told Officer Cogle the opposite was true. Gray's counsel reminded the court that the parties had agreed that Officer Cogle's testimony would be limited to what Gray said he had done. Taylor's counsel joined in the objection and moved for a mistrial on the ground that the testimony regarding "the urination" and "the 100 blows" was an end run around the *Aranda-Bruton* rule. Alternatively, he requested the court "admonish the jury about *Aranda-Bruton* and tell them this can only be used against Mr. Gray and not Mr. Taylor . . . ."

The trial court was unwilling to concede that there had been an *Aranda-Bruton* violation, noting that Gray's redacted statements did not obviously refer to Taylor. The court did, however, acknowledge that "the jury might . . . believe that Taylor's being referred to . . . because of prior evidence they've heard in the case from one or more percipient witnesses who have, in fact, testified that Taylor, not Gray, . . . urinated on [Smith] and took property from him . . . .," and thus, instructed the jury as follows: "The Court is sustaining a defense objection to Officer's Cogle's statements about what Mr. Gray said during his interview with Officer Cogle insofar as the following topics: One, whether any property was taken from Travis Smith; and two, whether any person urinated on Travis Smith. You must rely upon the testimony of other witnesses, if any at all, before concluding that either of these events took

place and/or whether either of the defendants took part in either of these events and/or were even present when and if these events took place." The trial court concluded that its instruction was "more than adequate because any bell that's been rung has already been rung a thousand times or quite a bit, . . . [by] other witnesses and other independent admissible evidence." The court denied Taylor's motion for a mistrial.

When Officer Cogle retook the stand, he testified in pertinent part as follows:

"Q. Okay. Did Mr. Gray tell you that after the second time that he saw Travis Smith he noticed Travis Smith's condition when he left?

"A. Yes.

"Q. Okay. And if I could just show you page 26, the last line, can you read what his response was?

"[¶] . . . [¶]

"A. Oh, yeah. He was talking, but I mean he was fucked up, dude. I ain't going to lie to you. He was fucked up.

"Q. And those were Mr. Gray's words?

"A. Correct.

"Q. And that pertains to the second occasion that night that he went to Travis Smith's location?

"A. Correct.

"Q. Was the other defendant, Mr. Taylor, arrested on that date, that same date?

"A. No.

"Q. Okay. Why not?



"A. He left the jurisdiction."

After the close of evidence, and several days after Officer Cogle finished testifying, the court instructed the jury in pertinent part: "You've heard evidence that Defendant Beau Houston Gray made a statement out of court before trial to the police. You may consider that evidence only against him, not against the other defendant."

In *Bruton*, *supra*, 391 U.S. at page 126 [20 L.Ed.2d at p. 479], the United States Supreme Court held that the admission of extrajudicial statements of a nontestifying codefendant in a joint trial violated the nondeclarant defendant's right of cross-examination even though the statement was admitted only against the declarant. The court reasoned that limiting instructions could not adequately ensure the jury would not use the evidence against the nondeclarant, stating "there are some contexts in which the risk that the jury will not, or cannot, follow instructions is so great, and the consequences of failure so vital to the defendant, that the practical and human limitations of the jury system cannot be ignored." (*Id.* at p. 135 [20 L.Ed.2d at p. 485].)<sup>6</sup>

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<sup>6</sup> The California Supreme Court anticipated the holding of *Bruton* in *Aranda*, *supra*, 63 Cal.2d 518, which announced a rule of procedure for joint criminal trials. The court held that the practice of permitting joint trials when the confession of one defendant which inculcates the other is admitted in evidence with limiting instructions was prejudicial and unfair to the nondeclarant defendant. (*Id.* at pp. 529-530.) After the passage of Proposition 8 (Cal. Const., art. I, § 28, subd. (d)), the California Supreme Court held the rule of *Aranda* was abrogated to the extent it required exclusion of relevant

Where the codefendant's statement is not "facially incriminating," redaction may cure the *Bruton* problem. (*Richardson v. Marsh* (1987) 481 U.S. 200, 211 [95 L.Ed.2d 176, 188] (*Richardson*).) In *Richardson*, the court held that a defendant's rights under the confrontation clause are not violated by the admission of a codefendant's confession that has been redacted "to eliminate not only the defendant's name, but any reference to his or her existence," even though the confession may incriminate the defendant when considered in conjunction with other evidence properly admitted against the defendant. (*Id.* at pp. 208-209, 211 [95 L.Ed.2d at pp. 186-188].)

In *People v. Fletcher*, *supra*, 13 Cal.4th at page 456, our Supreme Court decided an issue "expressly reserved in *Richardson v. Marsh*, *supra*, 481 U.S. 200--that is, whether it is sufficient, to avoid violation of the confrontation clause, that a nontestifying codefendant's extrajudicial confession is edited by replacing all references to the nondeclarant's name with pronouns or similar neutral and nonidentifying terms. Such a confession is 'facially incriminating' in the sense that it is sufficient by itself, without reference to any other evidence, to incriminate someone other than the confessing codefendant. It is not 'facially incriminating' only in the sense that it does not identify this other person by name." The court concluded that "whether this kind of editing--which retains

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evidence that need not be excluded under federal constitutional law. (*People v. Fletcher* (1996) 13 Cal.4th 451, 465.)

references to a coparticipant in the crime but removes references to the coparticipant's name--sufficiently protects a nondeclarant defendant's constitutional right of confrontation may not be resolved by a 'bright line' rule of either universal admission or universal exclusion. Rather, the efficacy of this form of editing must be determined on a case-by-case basis in light of the other evidence that has been or is likely to be presented at the trial. The editing will be deemed insufficient to avoid a confrontation violation if, despite the editing, reasonable jurors could not avoid drawing the inference that the defendant was the coparticipant designated in the confession by symbol or neutral pronoun." (*Ibid.*) In *Fletcher*, the court found that "[t]he [nontestifying codefendant's] confession was substantially (or 'powerfully') incriminating because the evidence properly admitted against the nondeclarant defendant at trial raised an issue regarding whether the nondeclarant had entertained a culpable criminal intent at the time of the charged crimes, and the codefendant's confession attributed a culpable intent to his coparticipant. The identification of the nondeclarant as the coparticipant mentioned in the confession was sufficiently direct (or 'facial'), even though the confession referred to the coparticipant only as 'a friend,' because the evidence at trial was such that a reasonable juror could not help but infer that the nonconfessing defendant was the 'friend' mentioned in the confession." (*Id.* at pp. 456-457.)

In *Gray v. Maryland* (1998) 523 U.S. 185 [140 L.Ed.2d 294], the United States Supreme Court addressed the use of neutral, nonidentifying terms. There, the codefendant's confession was read to the jury with the words "deleted" or "deletion" substituted for the names of the other participants in the beating that led to the victim's death. (*Id.* at p. 188 [140 L.Ed.2d at p. 298].) The court concluded the redaction was inadequate under the circumstances because, although the names of the other participants were eliminated, the redacted version continued to refer directly to the existence of the nonconfessing defendant. (*Id.* at p. 192 [140 L.Ed.2d at p. 300].) The court explained: "Redactions that simply replace a name with an obvious blank space or a word such as 'deleted' or a symbol or other similarly obvious indications of alteration . . . leave statements that, considered as a class, so closely resemble *Bruton's* unredacted statements that, in our view, the law must require the same result." (*Id.* at p. 192 [140 L.Ed.2d at p. 301].)

Taylor contends that in this case the prosecutor effectively "told the jury that Gray was not the sole assailant" by asking Officer Cogle about Gray's "involvement" in Smith's beating and implied Gray made claims about what his co-participant did by switching from questions asked in the active voice, such as "what did Mr. Gray say that *he did*," to questions asked in the passive voice, such as "did Mr. Gray tell you that *Travis was beaten* each of those two or three times," "did he tell you that *Travis was urinated on* during one of those

additional beatings," "did he give you a total number of blows that *Travis received* during those three times," and "did he say whether *property was taken* from Travis Smith." Based on the other evidence admitted at trial, Taylor asserts the jury could not help but infer that he was the other participant to whom Gray referred. In addition, Taylor claims the jury was "tipped off to the fact that Gray inculcated Taylor in talking to [Officer] Cogle" when the prosecutor asked Cogle, immediately after Cogle finished testifying about Gray's confession, whether Taylor was arrested that same day. Finally, Taylor claims that even if Gray's statements did not inculcate him, his Sixth Amendment rights nevertheless were violated by the court's failure to timely admonish the jury not to use Gray's statements against him.

As a preliminary matter, we reject the People's claim that Taylor forfeited his claims by failing to timely object or request the court admonish the jury. During the in limine proceedings Taylor moved to exclude Gray's statements to Officer Cogle insofar as they inculcated him. In response, the prosecutor represented that he intended to limit his questioning to what Gray said *he did*. The court agreed that would be an appropriate way to proceed, and granted Taylor's motion. On appeal, Taylor asserts the prosecutor's questioning went beyond what Gray said he did and suggested that someone else, namely Taylor, participated in the crimes. Under those circumstances, Taylor's claim was preserved for appeal. (See *People v. Archer* (2000) 82 Cal.App.4th 1380, 1386.)

To the extent Taylor claims that the trial court erred in failing to timely admonish the jury that Gray's statements could only be used against Gray and not Taylor, we note that Taylor requested the court to "admonish the jury about *Aranda-Bruton* and tell them this can only be used against Mr. Gray and not Mr. Taylor" in the middle of Officer Cogle's testimony concerning his interview with Gray. By making this request, Taylor preserved the issue for appeal.

Turning to the merits, we need not decide whether Gray's redacted confession indirectly referred to the existence of a co-participant, and if so, whether the jury could not avoid drawing the inference that the co-participant was Taylor because any error was harmless beyond a reasonable doubt. As the People persuasively maintain, even if the jury used Gray's confession against Taylor, it was merely corroborative and cumulative to the overwhelming, properly admitted evidence of Taylor's guilt. (See *People v. Song*, *supra*, 124 Cal.App.4th at p. 984.)

At trial, numerous witnesses testified and Taylor admitted that he participated in the June 8, 2008, assault on Smith. The evidence adduced at trial established that Taylor punched Smith in the face with such force that Smith was knocked to the ground. Taylor twice returned to Smith's location and punched, slapped, and or kicked Smith in the face. Taylor took money and methamphetamine from Smith. Taylor urinated on Smith.

Taylor disputes that the error was harmless based on "Gray's claim that a hundred blows rained down on Smith." According to Taylor, the jury must have found him guilty of

murder under an implied malice theory because he and Gray left Smith alive, and there was not overwhelming evidence of implied malice apart from Gray's statement concerning the 100 blows. We disagree.

"Second degree murder is the unlawful killing of a human being with malice aforethought, but without the premeditation, deliberation and willfulness necessary to elevate the offense to first degree murder. [Citation.] 'Generally, the intent to unlawfully kill constitutes malice.' [Citation.] Express malice murder requires an intent to kill. [Citations.] Implied malice murder requires 'an intent to do some act, the natural consequences of which are dangerous to human life. "When the killing is the direct result of such an act," the requisite mental state for murder--malice aforethought--is implied.' [Citation.]" (*People v. Bohana* (2000) 84 Cal.App.4th 360, 368.)

Assuming for argument's sake that the jury based its second degree murder verdict on a finding of implied malice, as Taylor claims, the evidence to support such a verdict was overwhelming without Gray's statement that Smith sustained 100 blows. Taylor participated in the assault on Smith during which Smith was punched in the face with such force that he was knocked to the ground, and his head was stomped on. During the assault, Smith was rendered unconscious only to be awakened and beaten again. Following the assault, Taylor left Smith outside overnight despite his obvious injuries and warned others not to call for help. As a result of the assault, Smith sustained a traumatic brain injury. The nature of Smith's injuries, the brutality of

the beatings, and defendants' decision to ignore Smith's injuries provide overwhelming evidence of implied malice. On this record, any potential *Aranda-Bruton* error was harmless beyond a reasonable doubt.

## II

### The Trial Court Adequately Instructed The Jury On Causation

Defendants next contend that their murder convictions must be reversed because the trial court failed to instruct, *sua sponte*, on the principle of independent intervening causation, and the instructions the court did give on causation likely misled the jury. As we shall explain, the trial court implicitly instructed the jury on independent intervening causation, and any potential error in otherwise instructing the jury was harmless beyond a reasonable doubt.

A court is required to instruct on the general principles of law that are closely and openly connected with the facts and are necessary for the jury's understanding of the case. (*People v. Breverman* (1998) 19 Cal.4th 142, 154.) This includes any affirmative defense for which the record contains substantial evidence. (*People v. Salas* (2006) 37 Cal.4th 967, 982.) "In considering a claim of instructional error we must first ascertain what the relevant law provides, and then determine what meaning the instruction given conveys. The test is whether there is a reasonable likelihood that the jury understood the instruction in a manner that violated the defendant's rights." (*People v. Andrade* (2000) 85 Cal.App.4th 579, 585.)



"To relieve a defendant of criminal liability, an intervening cause must be an unforeseeable and extraordinary occurrence. [Citation.] The defendant remains criminally liable if either the possible consequence might reasonably have been contemplated or the defendant should have foreseen the possibility of harm of the kind that could result from his act. [Citation.]" (*People v. Crew* (2003) 31 Cal.4th 822, 847 [Crew].) "[T]o be "independent" the intervening cause must be "unforeseeable . . . an extraordinary and abnormal occurrence, which rises to the level of an exonerating, superseding cause." [Citation.]'" (*People v. Cervantes* (2001) 26 Cal.4th 860, 871.)

There are no standard criminal instructions on independent intervening acts; when appropriate, corollary civil instructions on this aspect of causation may be used. (*People v. Brady* (2005) 129 Cal.App.4th 1314, 1328; see CACI No. 432.) Defendants did not request such an instruction below, nor was one given by the court. While we agree with defendants that causation instructions were required under the facts of this case; we do not agree that the instructions given by the trial court here were lacking.

The trial court instructed the jury in the language of CALCRIM No. 240 (Causation) as follows: "An act causes injury or death if the injury or death is the direct, natural, and probable consequence of the act and the injury or death would not have happened without the act. A natural and probable consequence is one that a reasonable person would know is likely to happen if nothing unusual intervenes. In deciding whether a

consequence is natural and probable, consider all the circumstances established by the evidence.

"There may be more than one cause of injury or death. An act causes injury or death only if it is a substantial factor in causing the injury or death. A substantial factor is more than a trivial or remote factor. However, it does not have to be the only factor that causes the injury or death."<sup>7</sup> CALCRIM No. 240

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<sup>7</sup> The jury was also instructed in the language of CALCRIM No. 620 (Causation: Special Issues) as follows: "There may be more than one cause of death. An act causes death only if it is a *substantial factor* in causing the death. A substantial factor is more than a trivial or remote factor. However, it does not need to be the only factor that causes the death.

"The failure of Travis Smith or another person to use reasonable care may have contributed to the death, but if the defendant's act was a substantial factor causing the death, then the defendant is legally responsible for the death, even though Travis Smith or another person may have failed to use reasonable care.

"The failure of the doctors or medical staff to use reasonable care in treating Travis Smith may have contributed to the death. But if the injury inflicted by the defendant was a substantial factor causing the death, then the defendant is legally responsible for the death even though the doctors or medical staff may have failed to use reasonable care. On the other hand, if the injury inflicted by the defendant was not a substantial factor causing the death, but the death was caused by grossly improper treatment by the doctors or medical staff, then the defendant is not legally responsible for the death.

"Travis Smith may have suffered from an illness or physical condition that made him more likely to die from the injury than the average person. The fact that Travis Smith may have been more physically vulnerable is not a defense to murder. If the defendant's act was a substantial factor causing the death, then the defendant is legally responsible for the death. This is true even if Travis Smith would have died in a short time as a result of other causes or if another person of average health would not have died as a result of the defendant's actions.

"If you have a reasonable doubt whether a defendant's act caused the death, you must find him not guilty."

"correctly indicates, in essence, that liability would not be cut off for an intervening act if the victim's death was nevertheless a 'direct, natural, and probable consequence' of defendant's original act." (*People v. Fiu* (2008) 165 Cal.App.4th 360, 372.) The language of CALCRIM No. 240 "requiring an injury or death to be a direct, natural and probable consequence of a defendant's act necessarily refers to consequences that are reasonably foreseeable." (*Ibid.*) Moreover, CALCRIM No. 240 defines a "natural and probable consequence" as "one that a reasonable person would know is likely to happen if nothing unusual intervenes." Further, while explaining that there may be more than one cause of death, CALCRIM No. 240 specifies that an act causes death "only if it is a substantial factor in causing . . . the death", and provides that a substantial factor "is more than a trivial or remote factor." By instructing the jury in the language of CALCRIM No. 240, the trial court implicitly instructed on the principle of independent intervening causation. (*See id.* at pp. 371-372.)

Moreover, any error in instructing the jury on causation was harmless beyond a reasonable doubt because no reasonable jury could conclude that defendants' acts were not a concurrent cause of Smith's death. (*See Crew, supra*, 31 Cal.4th at p. 847.) Even if Smith's consumption of alcohol and Fentanyl could be described as an independent intervening cause of his death, Smith's actions would relieve defendants of criminal liability only if the jury found that defendants' actions of punching

Smith, stomping on his head, leaving him outside overnight, and instructing others not to call for help were not a concurrent cause of Smith's death. (*Ibid.*)

In *Crew*, the defendant shot his wife in the head and rolled her down a ravine. (31 Cal.4th at p. 831.) The following evening he returned to the scene of the shooting with a friend. (*Ibid.*) When the defendant walked down to the body, "it had moved." (*Ibid.*) The defendant "'freaked out,'" ran back up to the truck where his friend was waiting, and told his friend about it. (*Ibid.*) The friend left, attempted to strangle defendant's wife, and eventually decapitated her. (*Ibid.*) On appeal, the defendant argued "the trial court should have instructed the jury that [the friend's] actions in strangling [the defendant's wife] and then cutting off her head could be an independent intervening cause breaking the causal connection between defendant's shooting of [his wife] and her death." (*Id.* at p. 847.) In concluding that any error was harmless under any standard, the court stated: "Even if [the friend's] actions could be described as an independent intervening cause of [defendant's wife's] death, they would relieve defendant of criminal liability only if the jury found that his shooting [his wife] in the head was not a concurrent cause of her death. No reasonable jury could have found that the shot defendant fired

into [the wife's] head was not a concurrent cause of her death."  
(*Ibid.*)<sup>8</sup>

The same is true here. Drs. Comfort and Dr. Herrmann both testified that Smith died as a result of blunt force trauma to the head, and that Smith's consumption of alcohol and Fentanyl was a contributing factor. On this record, no reasonable jury could have found that defendants' assault was not a concurrent cause of Smith's death.

Defendants' suggestion that Smith intended to kill himself is pure speculation. While Smith's life was in turmoil at the time of his death, there is no evidence he intended to kill himself or that he knew with any certainty that consuming alcohol or Fentanyl would result in his death. Likewise, no reasonable jury could conclude that Smith "killed himself accidentally by taking methamphetamine," as defendants claim. While Dr. Comfort found acute ischemia in Smith's small intestine, which can result from methamphetamine use (among other things), it is an acute condition, and the toxicology report was negative for methamphetamine. Nor could the jury reasonably conclude Smith died as a result of a new fall. While Drs. Curcio and Jain opined it was more likely that Smith's skull fractures were the result of a new fall as opposed to being missed on the earlier CAT scans, their opinions were not supported by the physical evidence, which established that the

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<sup>8</sup> Black's Law Dictionary defines "concurrent cause" as "[o]ne of two or more causes that simultaneously produces a result." (Black's Law Dict. (8th ed. 2004) p. 234, col. 1.)

skull fractures corresponded to the locations of the brain contusions, and there was no fresh trauma to the brain or injury to the scalp.

Because no jury reasonably could conclude that defendants' acts were not a concurrent cause of Smith's death, any error in instructing the jury on causation was harmless beyond a reasonable doubt.<sup>9</sup>

### III

#### Any Potential Error In Failing To Instruct On Unanimity With Regard To The Assault Charge Was Harmless

Defendants contend their convictions for assault must be reversed "because the jury was never told and never decided which of the three beatings formed the basis for the assault count." As we shall explain, any error was harmless beyond a reasonable doubt because defendants, through their counsel, admitted they assaulted Smith and no jury reasonably could conclude that the force used was not likely to cause great bodily injury.

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<sup>9</sup> Given our conclusion, defendants' assertion that the jury likely was misled by the court's instructions on causation also fail. We pause to note, however, that defendants' contention that the jury was instructed that defendants were not legally responsible for Smith's death if his death was caused by grossly improper treatment by the doctors and medical staff is incorrect. Rather, the jury was instructed that "*if the injury inflicted by the defendant was not a substantial factor causing the death but the death was caused by grossly improper treatment by the doctors or medical staff, then the defendant is not legally responsible for the death.*" (Italics added.) As detailed above, the evidence was overwhelming that the injury inflicted by defendants was a substantial factor in causing Smith's death.

"In a criminal case, a jury verdict must be unanimous. [Citations.] . . . Additionally, the jury must agree unanimously the defendant is guilty of a *specific* crime. [Citation.] Therefore, cases have long held that when the evidence suggests more than one discrete crime, either the prosecution must elect among the crimes or the court must require the jury to agree on the same criminal act." (*People v. Russo* (2001) 25 Cal.4th 1124, 1132.)

Even absent a request, when the evidence shows more than one discrete crime, the court must instruct the jury on unanimity unless the prosecutor has elected which crime. A unanimity instruction is not required, however, where the criminal acts are so closely connected they form a single transaction or where the statute contemplates a continuous course of conduct. (*People v. Riel* (2000) 22 Cal.4th 1153, 1199; *People v. Stankewitz* (1990) 51 Cal.3d 72, 100.)

"The erroneous failure to give a unanimity instruction is harmless if disagreement among the jurors concerning the different specific acts proved is not reasonably possible." (*People v. Napoles* (2002) 104 Cal.App.4th 108, 119.)

We conclude that no such disagreement is reasonably possible where, as here, defendants, through their counsel, admitted assaulting Smith. In arguing that Taylor was not guilty of torture or murder, Taylor's counsel stated: "As far as the assault, at least as far as my client is concerned, he definitely assaulted Travis Smith. There's no doubt about that. And there's no doubt that in my mind that Travis Smith

suffered something. I'm not up here trying to tell you nothing happened. . . . I'm trying to tell you to take a hard look at the evidence and see what it proves and what it fails to prove beyond a reasonable doubt . . . ." Gray's counsel likewise admitted that "there was an assault here, and certainly there was great bodily injury that was done here." Given defendants' admissions and the evidence presented concerning their participation in the assault, there was no basis for the jury to conclude defendants were not guilty of assault with force likely to cause great bodily injury. Accordingly, any error in failing to instruct on unanimity as to that charge was harmless beyond a reasonable doubt.

#### IV

#### Defendants Forfeited Their Claim That The Prosecutor Committed Misconduct During Closing Argument, And In Any Event, It Fails On The Merits

Defendants next contend the judgment must be reversed because the prosecutor "misled [the jury] about 'proof beyond a reasonable doubt'" by (1) arguing reasonable doubt must be "doubt with a reason behind it," (2) comparing a criminal case to a jigsaw puzzle, and (3) comparing his burden to the burden jurors face when making important decisions about their everyday lives. As we shall explain, defendants forfeited this claim on appeal by failing to object below, and in any event, it fails on the merits.

In order to preserve a claim of prosecutorial misconduct, a defendant must make a timely objection and request an admonition, unless an admonition would not have cured the harm.



(*People v. Friend* (2009) 47 Cal.4th 1, 29.) Had defendants done so here, the trial court could have instructed the jury that the prosecutor's remarks were not to be understood to suggest a different standard of proof than the one given in the instructions.

Even assuming the argument was not forfeited, it fails on the merits. "A prosecutor who uses deceptive or reprehensible methods to persuade the jury commits misconduct, and such actions require reversal under the federal Constitution when they infect the trial with such "unfairness as to make the resulting conviction a denial of due process.'" [Citations.] Under state law, a prosecutor who uses such methods commits misconduct even when those actions do not result in a fundamentally unfair trial." (*People v. Alfaro* (2007) 41 Cal.4th 1277, 1328.) In evaluating the prosecutor's remarks, "we must view the statements in the context of the argument as a whole." (*People v. Dennis* (1998) 17 Cal.4th 468, 522.)

Before closing arguments, the trial court instructed jurors in pertinent part as follows: "Proof beyond a reasonable doubt is proof that leaves you with an abiding conviction that the charge is true. The evidence need not eliminate all possible doubt, because everything in life is open to some possible or imaginary doubt. In deciding whether the People have proved their case beyond a reasonable doubt, you must impartially compare and consider all the evidence that was received throughout the entire trial." The court also instructed jurors that they must follow the law as explained by the court, and to

the extent the attorneys' comments on the law conflict with the court's instructions, jurors must follow the court's instructions.

At the beginning of his closing argument, the prosecutor reminded the jury that "the law itself . . . comes from one person, and that's the judge" and cautioned the jury to "go with what [the judge] told you and not what I'm telling you" in the event the prosecutor's comments contradicted the court's instructions. The prosecutor then proceeded to discuss each of the charges, the applicable law, and the credibility of the key witnesses. He did not mention reasonable doubt.

During his closing argument, Gray's counsel also reminded the jury that the law as instructed by the court "is the correct interpretation of the law . . . ." Later, Gray's counsel turned to the reasonable doubt standard, telling the jury that although the instruction had recently been re-written it was still "very confusing." He explained that while he could not tell jurors they must "be a certain percent sure," he could tell them that they "better be really, really sure."

The prosecutor responded in his rebuttal, noting that while the beyond a reasonable doubt standard is a "high standard," "it is the same standard of proof that's used to convict everyone in every courtroom in this building. . . . It's not this impossible burden. It's not proof beyond all reasonable doubt or any possible doubt or any shadow of a doubt." He then provided jurors with his "interpretation" of how he wanted them to look at reasonable doubt: "It has to be a doubt with a reason behind

it. You can't just say things just don't add up here. Something just doesn't seem right. It's got to be doubt with a reason where you can articulate it to the other jurors. . . . It has to be a doubt with a reason behind it." He explained that it is possible to have doubts about anything, including whether the sun is going to rise in the morning and stated, "It's not a reasonable doubt that of all days tomorrow the sun isn't going to rise after all these thousands of years. It has to be doubt with a reason."

The prosecutor then likened the way jurors should look at reasonable doubt to a jigsaw puzzle of the Golden Gate Bridge that is missing a few pieces. In his example, a juror purchases a puzzle of the Golden Gate Bridge, realizes it is missing pieces, but decides to put it together anyway. When he finishes the puzzle, he says, "Hey. It's just like the picture on the box. That's the Golden Gate Bridge." Even though there is a piece missing from the tip of the north bridge tower, another from the toll plaza, and a couple from the sky, he "can say beyond a reasonable doubt that's the Golden Gate Bridge." He could not, however, "say beyond any doubt whatsoever or beyond a shadow of a doubt that that's the Golden Gate Bridge because somewhere some place [there] could be an identical shaped orange bridge except on that bridge . . . the tip of the north tower where your piece is missing could be purple . . . ."

Finally, the prosecutor urged jurors not to leave their common sense behind when they deliberated. In doing so, he acknowledged that while "[t]his is a serious decision," "you reason

it the same way as you make any serious decision in your own life, like buying a house. You wouldn't just say I'm going to buy that house up on the hill because it has a great view. You have to say, I really like that house, but let's see how much they're asking and how much of a mortgage can I afford. . . . You put all these things together and reason it out and come to a decision. You don't base it on, like one thing."

The prosecutor's comments, in context, did not dilute or mislead jurors concerning the standard of proof. Although in the abstract the statement, "It's got to be doubt with a reason where you can articulate it to the other jurors" could be interpreted to mean that a juror could not find reasonable doubt unless he or she could supply a reason for the doubt, in context it is clear the statement was made in response to Gray's counsel's argument that beyond a reasonable doubt requires jurors be "really, really sure," and that the prosecutor's point was that the standard contemplates reasonable doubt, not any possible doubt.

Nor, in context, do we believe the jury would interpret the jigsaw puzzle analogy to mean that jurors were free to guess or jump to a conclusion as defendants suggest. Unlike the prosecutor in *People v. Katzenberger* (2009) 178 Cal.App.4th 1260, cited by defendants, the prosecutor here did not suggest a specific quantitative measure for reasonable doubt or invite the jury to guess or jump to a conclusion. (*Id.* at pp. 1267-1268 [prosecutor argued, with use of a Power Point presentation showing six of eight pieces of a Statue of Liberty puzzle, that

reasonable doubt standard had been met].) Rather, he was attempting to illustrate the difference between reasonable doubt and any doubt whatsoever.

Nor would the jury have understood the prosecutor's remark that "you reason it the same way as you make any serious decision in your own life, like buying a house" as lowering the prosecutor's burden of proof. Rather, the prosecutor's point, consistent with the court's instructions, was that in making its decision, the jury must "consider all the evidence" and not "base it on, like one thing."

Counsels' closing arguments and the court's jury instructions "unambiguously communicated to the jury that the prosecution had the burden of proving every element of the case beyond a reasonable doubt. The record does not demonstrate that the prosecution employed deceptive or reprehensible methods to persuade the jury, and, in light of the entire record there was no reasonable likelihood that the jury erroneously construed the prosecution's burden of proof." (*People v. Samayoa* (1997) 15 Cal.4th 795, 842.)

Even if we agreed the prosecutor overstepped the bounds of permissible argument, such error did not cause any prejudice. The trial court instructed the jury to follow the law as given by the trial court, not the attorneys, and both the prosecutor and Gray's counsel reiterated that point in their closing arguments. If the jury interpreted the prosecutor's remarks as describing a lower standard of proof, there is no reason to believe it would have followed that standard rather than the

standard given by the trial court. We presume the jury would follow the trial court's instructions, including the instruction to disregard those statements of the law given by attorneys that conflicted with the instructions. (*People v. Sanchez* (2001) 26 Cal.4th 834, 852.)

V

The Trial Court Properly Found That Taylor's  
Prior Conviction Constituted A Strike

Taylor contends there is insufficient evidence to support the trial court's finding that his prior conviction for battery with infliction of serious bodily injury (§ 243, subd. (d)) constituted a strike pursuant to the provisions of section 1170.12. As we shall explain, the trial court properly found Taylor's prior conviction constituted a strike based on Taylor's admission that it constituted a strike.

Pursuant to section 1170.12, subdivision (b)(1), "a prior conviction of a felony" includes "any offense defined in subdivision (c) of Section 1192.7 as a serious felony in this state." Although battery with infliction of serious bodily injury is not one of the enumerated serious felonies listed in section 1192.7, subdivision (c), the prosecution argued that the offense was a serious felony under the general category of "any felony in which the defendant personally inflicts great bodily injury on any person, other than an accomplice, or any felony in which the defendant personally uses a firearm." (§ 1192.7, subd. (c)(8).)

We need not determine whether there is sufficient evidence that Taylor's prior conviction for battery with infliction of

serious bodily injury falls within the general category set forth in section 1192.7, subdivision (c)(8) because in pleading guilty to that offense, Taylor admitted it constituted a strike.

The change of plea form reflects a plea of guilty to the alleged violation of section 243, subdivision (d), as well as an admission that the offense was a serious felony and an advisement that Taylor could face enhanced punishment in the future under the three strikes law. Taylor's initials appear next to the following "consequence" listed in the change of plea form: "I understand that my plea in this case is a 'strike' pursuant to the provisions of Penal Code § 1170.12 ("Three-Strikes Law") and that if I am charged with any felony in the future, this conviction or convictions can be pleaded and proved and may increase any future sentence as provided in that section." In addition, Taylor signed the plea form under penalty of perjury.

Taylor's admission, under penalty of perjury, that his prior conviction for battery with infliction of serious bodily injury constituted a strike alone supports the trial court's finding.

## VI

### The Trial Court Erred In Refusing To Stay Defendants' Sentences For Assault

Defendants contend the trial court erred in refusing to stay their sentences for assault under section 654 because the assault was the means of perpetrating the murder and there is no evidence defendants had separate criminal objectives for the assault and the murder. We agree.

"Section 654 prohibits punishment for two offenses arising from the same act or from a series of acts constituting an indivisible course of conduct. [Citations.] 'Whether a course of criminal conduct is divisible and therefore gives rise to more than one act within the meaning of section 654 depends on the intent and objective of the actor. If all the offenses were incident to one objective, the defendant may be punished for any one of such offenses but not for more than one.'" (*People v. Sok* (2010) 181 Cal.App.4th 88, 99.)

At sentencing, the prosecutor argued that the assault and murder were two separate acts that warranted separate punishments. More specifically, he asserted that the three beatings were sufficiently attenuated to constitute three separate incidents, and that Smith's death resulted from the third beating or from Smith being left outside overnight, while the assault was the result of the first or second beating. The trial court agreed, reasoning: "[W]e have a series of events here. . . . and I think it's incumbent upon the trial court judge to punish for those separate events. A defendant doesn't get a volume discount for engaging in a number of events. . . . [¶] . . . [I]t appears to me that you have separate distinguishable events, and that there were moments in between those events that afforded an opportunity to withdraw from the action, to obtain help for the victim, and those opportunities were not taken advantage of. And I think it's incumbent upon the court to impose consecutive sentencing."



The problem with the trial court's reasoning is that while there were three separate beatings, it is impossible to discern from the evidence which beating or beatings caused Smith to suffer the traumatic brain injury that ultimately resulted in his death. Indeed, in urging the jury to find defendants guilty of murder based on their participation in the beatings, the prosecutor argued: "We'll never know in this case which defendant struck the fatal blow or if there was even a fatal blow. It may have been just an accumulation of blows." Accordingly, it is impossible to say whether the assault and the murder constituted separate acts.

Moreover, even assuming the assault and the murder were separate events, there is no substantial evidence to support a finding that defendants' objective in beating Smith was separate from, rather than incidental to, their intent and objective in killing him. There is no evidence that defendants initially intended only to assault Smith but later intended to kill him or that they beat Smith for one reason and killed him for another. To the contrary, the only evidence is that the series of beatings was the means of committing the murder, the series of beatings facilitated the murder, and the series of beatings were incidental to commission of the murder.

Since we cannot reasonably find that the assault and the murder constituted two separate acts or, even assuming they were separate acts, that defendants' intent and objective in beating Smith was separate from their intent and objective in killing him, section 654 prohibits imposition of separate punishment for

the assault and murder. The judgments must be modified to stay defendants' sentences for assault.

#### VII

#### Defendants Were Not Prejudiced By Counsels' Alleged Errors

Finally, defendants contend that their trial counsel were ineffective in (1) stipulating to the statement of the case; (2) failing to object during opening statements when the prosecutor misstated the law on provocation; (3) failing to object during closing arguments when the prosecutor misstated the law on reasonable doubt; and (4) failing to request a separate instruction on independent intervening causation. Taylor further asserts that his trial counsel was ineffective in failing to "protect [him] from Confrontation Clause error" and failing to argue that his prior conviction for battery with great bodily injury did not constitute a strike. As we shall explain, defendants were not prejudiced by counsels' alleged errors.

To prevail on an ineffective assistance of counsel claim, a defendant must show that counsel's performance was deficient and that the deficient performance prejudiced the defense.

(*Strickland v. Washington* (1984) 466 U.S. 668, 687 [80 L.Ed.2d 674, 693].) To establish prejudice, defendants "must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome." (*Strickland v. Washington, supra*, 466 U.S. at p. 694 [at p. 698].) "[A]

court need not determine whether counsel's performance was deficient before examining the prejudice suffered by the defendant as a result of the alleged deficiencies. . . . If it is easier to dispose of an ineffectiveness claim on the ground of lack of sufficient prejudice, . . . that course should be followed." (*Id.* at p. 697 [at p. 699].)

As detailed above, no prejudice resulted from the trial court's alleged *Bruton* or instructional errors or the prosecutor's alleged misconduct during closing argument. The same is true with respect to Taylor's counsel's failure to argue that his prior conviction for battery with great bodily injury did not constitute a strike. That leaves counsels' stipulation to the statement of the case and failure to object during opening statements when the prosecutor purportedly misstated the law on provocation.

Turning first to the stipulation of the case read to prospective jurors, defendants take issue with the following statement: "Shasta County Coroner's Office ruled [Smith] died from blunt-force trauma to the head." Defendants claim this statement was erroneous because the coroner ruled that blunt force trauma combined with Smith's consumption of alcohol and drugs following his release from the hospital caused Smith's death, and absent the error "there likely would have been no jury finding that the defendants caused Smith's death." Not so.

Immediately prior to reading the statement of the case, the trial court expressly reminded the jury that "I'm not providing you with any evidence on this case. None of these comments I'm

making right now are to be considered by you as evidence in the case. Only evidence that takes place during the course of the trial are facts that we want you to consider in reaching the decisions that you need to reach at the end of the trial. . . . None of this is to be considered by you as evidence.” Given the court’s admonition, we find it extremely unlikely that the jury disregarded the evidence at trial that Smith’s consumption of alcohol and Fentanyl contributed to his death. Moreover, as previously discussed, no reasonable jury could conclude that defendants’ assault was not a concurrent or substantial cause of Smith’s death. Accordingly, defendants cannot establish they were prejudiced by counsels’ stipulation to a statement of the case that failed to mention that Smith’s consumption of alcohol and Fentanyl contributed to his death.

Citing *People v. Najera* (2006) 138 Cal.App.4th 212 (*Najera*), defendants also contend their counsel were ineffective in failing to object when the prosecutor told the jury during opening statements “that voluntary manslaughter involves a situation so emotional and provocative that ‘almost anybody faced with that situation probably would have resorted to killing.’”

In *Najera*, the court determined that the prosecutor had misstated the legal standard of provocation by arguing that the law required a reasonable person to have killed under the circumstances. (138 Cal.App.4th at p. 223.) The court explained, “An unlawful homicide is upon ‘a sudden quarrel or heat of passion’” if the killer’s reason was obscured by a

“provocation” sufficient to cause an ordinary person of average disposition to act rashly and without deliberation. [Citation.] The focus is on the provocation--the surrounding circumstances--and whether it was sufficient to cause a reasonable person to act rashly.” (*Ibid.*)

Even if some of the prosecutor’s comments during opening statements in this case misstated the legal standard of provocation, the jury was subsequently instructed in pertinent part as follows: “A person acts in the heat of passion when he or she is provoked into doing a rash act under the influence of intense emotion that obscures his or her reasoning or judgment. The provocation must be sufficient to have caused a person of average disposition to act rashly and without due deliberation.” The jury was also instructed that it must follow the law as explained by the court, and to the extent the attorneys’ comments on the law conflict with the court’s instruction, the jury must follow the court’s instructions. During closing arguments, both the prosecutor and Gray’s counsel reminded the jury that it must follow the law as explained by the court and not counsel. We presume the jury would follow the trial court’s instructions, including the instruction to disregard those statements of the law given by attorneys that conflicted with the instructions. (*People v. Sanchez, supra*, 26 Cal.4th at p. 852.) On this record, defendants failed to establish they were prejudiced by counsels’ failure to object to the prosecutor’s alleged misstatement of the law of provocation during opening statements.

Finally, we are satisfied that counsels' alleged errors, even when considered cumulatively, did not prejudice defendants.

DISPOSITION

The judgments are modified to stay the sentences on count 3, assault with force likely to cause great bodily injury. As so modified, the judgments are affirmed. The trial court is directed to amend the abstracts of judgment to (1) refer to the crime of assault with force likely to cause great bodily injury as count 3 (not count 4), (2) reflect that the section 12022.1 enhancement is imposed as to count 3 (not count 4) in Taylor's case, and (3) reflect that the terms imposed for count 3 (assault with force likely to cause great bodily injury) are stayed pursuant to section 654. The trial court is further directed to send a certified copy of the amended abstracts to the Department of Corrections and Rehabilitation.

\_\_\_\_\_, J.  
BLEASE

We concur:

\_\_\_\_\_, P. J.  
RAYE

\_\_\_\_\_, J.  
HOCH